

401 WATER QUALITY CERTIFICATION FREQUENTLY ASKED QUESTIONS

What is 401 Water Quality Certification and how do I know if I need it?

Section 401 of the Clean Water Act requires that any person applying for a federal permit or license which may result in a discharge of pollutants into waters of the United States, must obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. No license or permit may be issued by a federal agency until certification required by Section 401 has been granted. Further, no license or permit may be issued if certification has been denied.

The following permits or licenses are subject to section 401 of the Clean Water Act:

- Clean Water Act section 404 permits and authorizations;
- Permits issued under sections 9 and 10 of the Rivers and Harbors act;
- Licenses for hydroelectric power plants issued by the Federal Energy Regulatory Commission under the Federal Power Act; and
- Licenses issued by the Nuclear Regulatory Commission.

Water quality standards, according to the Clean Water Act (40 CFR 131), include:

- Beneficial Uses - defined as the uses of water necessary for the survival or well being of man, plants, and wildlife. Beneficial uses are designated in the Basin Plan for water bodies within the region. Examples include agriculture, recreation, wildlife habitat, and warm water aquatic habitat.
- Water Quality Objectives - numeric and/or narrative limits or bans on substances, water characteristics, and activities.
- Antidegradation Policy - requires that existing high-quality waters be protected and maintained.

If you have a waters of the United States (e.g., creek, drainage with or without water flow, wetland) on your property, and you intend to dredge or fill waters of the U.S., then 401 water quality certification is necessary. If you are not sure if you have a waters of the U.S. on your property, consult an expert; do not assume that you do not, as you may be subject to civil and criminal penalties if a waters of the U.S. is dredged or filled without authorization.

I have been told that the surface water on my property is “isolated”. What does this mean and do I need a 401 certification?

The *Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers* (hereinafter “SWANCC”), U.S. Supreme Court decision was issued on January 9th and addressed a section of the Clean Water Act known as the “Migratory Bird Rule”. As a result of the court ruling, certain waters of the State are no longer considered waters of the U.S. Please contact the Army Corps of Engineers (ACOE) to determine if a surface waterbody is “isolated” in accordance with the SWANCC ruling. If the ACOE determines that the waterbody is isolated, and you are not subject to a federal permit, you do not need to apply for 401 certification; however, this does not exempt you from complying with state regulations. **The SWANCC decision does not affect the State’s authorities under the California Water Code to regulate discharges to isolated, non-navigable waters of the state.**

If anything definitive can be said about the *SWANCC* decision, it is that the Supreme Court believes regulating inland waters, including isolated wetlands, vernal pools, etc., are the primary (and probably now the exclusive) province of the state. California has numerous authorities that require these waters to be protected. None of those state authorities are affected by the U.S. Supreme Court's decision. Accordingly, the *SWANCC* decision has no impact upon the Regional Board's authority to act under state law.

The State protects and regulates isolated waters through the California Water Code. California Water Code section 13260 requires "any person discharging waste, or proposing to discharge waste, within any region that could affect the *waters of the state* to file a report of discharge (an application for waste discharge requirements)." (Water Code § 13260(a)(1) (emphasis added).) The term "waters of the state" is defined as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050(e).) The U.S. Supreme Court's ruling in *SWANCC* has no bearing on the Porter-Cologne definition. While all waters of the United States that are within the borders of California are also waters of the state, the converse is not true—waters of the United States is a subset of waters of the state. Thus, since Porter-Cologne was enacted, California always had and retains authority to regulate discharges of waste into any waters of the state, regardless of whether the ACOE has concurrent jurisdiction under section 404. The fact that often Regional Boards opted to regulate discharges to, e.g., vernal pools, through the 401 program in lieu of or in addition to issuing waste discharge requirements (or waivers thereof) does not preclude the regions from issuing WDRs (or waivers of WDRs) in the absence of a request for 401 certification.

Under state law, the duty to file a report of waste discharge is mandatory; if you have a surface water that is "isolated" you **must apply** for and obtain waste discharge requirements prior to impacting that waterbody.

Where can I find the 401 application?

Applications can be picked up at the San Diego Regional Board office, downloaded from the San Diego Regional Board's web site, or be received via fax. To request an application by fax, please contact the Regional Board at 858-467-2952. Applications may be picked up at the Regional Board office on 9174 Sky Park Court, Suite 100; San Diego, CA 92123. Applications can be downloaded in Adobe Acrobat at: <http://www.swrcb.ca.gov/rwqcb9/programs/401cert.html>.

Please be aware that each Regional Board and the State Water Resources Control Board have different application forms for 401 certification. It is your responsibility to use the correct form. If an application is submitted using another region's form, we may ask you to complete this region's form as well; this may result in delays in processing your application. Also, failure to completely and accurately respond to all items on the application form may result in your application being determined incomplete and can result in delays in processing your application. Additionally, be aware that the application form is updated regularly; use of an outdated application form will result in processing delays.

What are the timelines for processing a 401 application?

The Regional Board has 30 days following receipt of an application to notify the applicant if their application is complete or incomplete. If the application is incomplete, the Regional Board has another 30 days to review submitted material and determine if the application is complete. The applicant does not have a time line for submittal of materials, but delays in submitting the

required material can result in delays in processing the 401 application. If the Regional Board fails to notify the applicant regarding the completeness of an application, the application is deemed complete 30 days following receipt by the Regional Board, per the Permit Streamlining Act.

Once an application has been deemed complete, the Regional Board can request materials to clarify impacts, mitigation, or other aspects of the application. The Regional Board has between 60 days and 1 year in which to make a decision. If processing and review of the 401 application will take more than 60 days, the Regional Board may request additional time from the ACOE or issue a Denial without Prejudice. This usually occurs when an applicant has not supplied requested information or the project is complex and issues have not been resolved. A denial without prejudice is not a reflection on the project, but a means to stop the clock until the required information has been provided.

The Regional Board also has a public comment period that lasts a minimum of 21 days. The period closes when the Regional Board decides to take an action on the 401 application. The public comment period does not close after a certain number of days because proposed projects tend to change through the 401 process and the public is allowed to review and comment on the changed project. The public comment period starts shortly after an application has been received and remains open until an action is taken by the Regional Board.

Pending 401 applications and recently completed 401 certification actions are posted at: http://www.swrcb.ca.gov/rwqcb9/programs/401cert/UPDATED%20PUBLIC_NOTICE%206-1-04.pdf.

What are the regulatory requirements for an application to be determined complete?

1. Completely filled out application form.
2. Full, technically-accurate description, including the purpose and final goal of the entire activity [23 CCR § 3856(b)].
3. Complete project description [23 CCR § 3856(h)(1-8)] including:
 - Jurisdictional Wetland Delineation
 - Mitigation and Monitoring Plans
 - Any other documents relating to water quality and beneficial uses
 - Grading Plans and/or final conceptual engineering drawings and detailed maps
4. A detailed description of all measures to be taken to prevent the proposed project from adversely affecting the water quality and beneficial uses of the water body(ies) to be impacted.
5. Identification of the federal license/permit (i.e., agency, type, NWP number, file number) [23 CCR § 3856(c)]
6. Copies of federal application, notification, agency-applicant correspondence, or signed statement that none is applicable [23 CCR § 3856(d)]
7. Copies of any final or (if not final) draft federal, state, or local licenses, permits, or agreements concerning the project (i.e., Fish and Game Streambed Alteration Agreement). If none are available, a list of those being sought. [23 CCR § 3856(e)]
8. A draft or final CEQA document. [23 CCR § 3856(f)]. Note: Per the Permit Streamlining Act, final CEQA documentation cannot be required for a complete application; however, per CEQA, a final document must be reviewed before the Regional Board can take an action on your project.
9. The correct fee deposit. [23 CCR § 3856(g)].

Please note that this information is required for your application to be determined complete. Once the Regional Board has determined that an application is complete, it may request further information from the applicant. Such information must clarify, amplify, correct, or otherwise supplement the contents of a complete application in order for the certifying agency to determine whether a certification should be issued. Supplemental information may include evidence of compliance with appropriate requirements of a water quality control plan.

What other permits might be necessary for impacting a waters of the U.S.?

The California Coastal Commission. The California Coastal Act of 1976 requires any person proposing to undertake development in the Coastal Zone to obtain a Coastal Development Permit. The Coastal Zone extends inland anywhere from approximately 500 yards in developed urban areas to five miles in undeveloped areas. If projects are proposed in or adjacent to existing or historic coastal wetland areas, they will require Coastal Development Permits issued by the Coastal Commission. To find out if your project is in the Coastal Zone you should contact the planning division of your local government.

California Department of Fish and Game. The California Department of Fish and Game requires a Streambed Alteration Agreement (SAA) for projects that will divert or obstruct the natural flow of water, change the bed, channel, or bank of any stream, or propose to use any material from a streambed. The SAA is subject to the California Environmental Quality Act and all information necessary for stream projects must be disclosed.

The Army Corps of Engineers. The regulatory authority of the ACOE for creek projects is based on Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Section 404 of the Clean Water Act requires ACOE authorization for work involving placement of fill or discharge of dredged materials into any "waters of the United States". Section 10 of the Rivers and Harbors Act requires ACOE authorization for work or structures in or affecting "navigable waters". ACOE jurisdiction extends up to the ordinary high water line for non-tidal waters and up to the line of high tide (for dredge or fill), or mean high water line (for work or structures) for tidal waters.

U.S. Fish and Wildlife Service. The U. S. Fish and Wildlife Service reviews and comments on projects pursuant to the Fish and Wildlife Coordination Act, the Clean Water Act, and the National Environmental Policy Act. The Service's comments focus on the effects of projects on all fish and wildlife resources and the habitats that support those resources. Such projects may be, but not limited to, flood control, urban and industrial development, habitat restoration activities, etc. The Service also reviews projects for their affects pursuant to the Federal Endangered Species Act (Act). The Act, through Section 9, prohibits the take of any species listed as threatened or endangered pursuant to the Act without a specific exemption. The term "take" is broadly defined and if "take" is going to occur a permit from the Service is required. If there is another Federal Agency involved then exemption from the "take" provisions of the Act can be achieved through a Section 7 process. If there is no Federal involvement than a permit pursuant to Section 10, also known as a Habitat Conservation Plan, will be needed.

National Marine Fisheries Service. The National Marine Fisheries Service (NMFS) is the federal agency responsible for the conservation and management of the nation's living marine resources. Projects or activities that may affect marine fish and related habitat within NMFS jurisdiction are reviewed for any potentially harmful effects. These evaluations are conducted under the authorities of the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act, and the National Environmental Policy

Act. The purpose of reviews conducted by NMFS is to ensure that sensitive populations of marine and anadromous fish (such as salmon and steelhead), as well as the aquatic and riparian habitat that support these fish, can survive and recover in the presence of human activities. Through these reviews, the need to conserve and protect fish and habitat is balanced with the need to responsibly utilize natural resources for economic and other purposes. The types of projects and activities of interest to NMFS include streambank stabilization, streambed alteration, habitat restoration, flood control, urban and industrial development, and water resource utilization. When projects or activities require a federal permit, such as a Clean Water Act section 404 permit from the Army Corps of Engineers, then NMFS conducts a consultation with the federal agency under section 7 of the ESA. When there is no federal involvement, then for projects that incidentally "take" a listed species a permit under section 10 of the ESA is required.

There may also be regulatory requirements associated with city and county ordinances. The applicant is responsible for knowing all the applicable rules and regulations, and for compliance with them.

What are the fees for processing a 401 application?

A current fee schedule can be found at:

<http://www.swrcb.ca.gov/rwqcb9/programs/401cert/Revised%20Fee%20Schedule%20for%20401%202003%2010%2028.pdf>.

A fee calculator can be found at:

<http://www.swrcb.ca.gov/cwa401/docs/feecalculator.xls>.

Where can I get a copy of section 401 Clean Water Act?

Copies of the current regulations can be found at:

<http://www.epa.gov/owow/wetlands/regs/sec401.html>.

Who should I contact with questions regarding 401 certification?

WATERSHED	STAFF CONTACT
Penasquitos, San Dieguito, San Diego, Otay	Michael Porter: 858-467-2726
Pueblo, Sweetwater, Tijuana	Phil Hammer: 858-627-3988
Carlsbad	Christopher Means: 858-637-5581
San Luis Rey, San Juan	Jeremy Haas: 858-467-2735
Santa Margarita	Megan Quigley: 858-268-5363

I am proposing a project that is within the jurisdiction of two or more Regional Boards. Who do I contact regarding the application?

The State Water Resources Control Board reviews and takes action on multi-region 401 applications. You may contact them at 916-341-5506 or wqcert@swrcb.ca.gov.

When should I submit my 401 application?

Applications are typically submitted concurrently with submittals to the ACOE and CDFG. The Regional Board encourages you to submit a complete application as soon as possible. Due to the varying degree of complexity between 401 applications, the time necessary to review and process

an application can vary greatly. It is to the applicants advantage to submit 401 application concurrently with 404 applications and to hold joint meetings with all resource agencies. This will help facilitate communication and coordination between the applicant and the agencies. Also, a 401 certification is required before a 404 permit or authorization can be issued; therefore, it is in the applicants best interest to submit a complete application as soon as possible.

Do I need to submit a Storm Water Pollution Prevention Plan (SWPPP) with my 401 application?

A SWPPP is not a requirement of a complete 401 application; however, information typically required for a SWPPP is also necessary for the processing of a 401 application. This is particularly true for post-construction best management practices (BMPs). Submitted BMP information should include, at a minimum, location and type of BMP, BMP effectiveness for given pollutants and pollutant loads, entity responsible for maintenance and expected pollutants and loads from the proposed project.

Where do I send my application?

Your application should be sent to:

Mr. John Robertus
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court., Suite 100
San Diego, CA 92123

What is the public notification period and is it the same as the ACOE public notice period?

The California Code of Regulations, Section 3858(a) states “The executive director or the executive officer with whom an application for certification is filed shall provide public notice of an application at least twenty-one (21) days before taking certification action on the application, unless the public notice requirement has been adequately satisfied by the applicant or federal agency. If the applicant or federal agency provides public notice, it shall be in a manner and to an extent fully equivalent to that normally provided by the certifying agency. If an emergency requires that certification be issued in less than 21 days, public notice shall be provided as much in advance of issuance as possible, but no later than simultaneously with issuance of certification.”

Public notice of pending 401 Water Quality Certification applications within the San Diego Region can be found at:

http://www.swrcb.ca.gov/rwqcb9/programs/401cert/UPDATED%20PUBLIC_NOTICE%206-1-04.pdf.

The Regional Board’s public notice period is separate and distinct from the ACOE public notice. Public comments will be accepted on a pending 401 application until an action is taken. An action will not occur within the 21-day comment period unless the project is an emergency and time is of the essence.

What is the Basin Plan and how can I get a copy?

Each of the nine Regional Boards within California are required to adopt a Water Quality Control plan, or Basin Plan, which recognizes and reflects the regional differences in existing water

quality, the beneficial uses of the Region's ground and surface waters, and local water quality conditions and problems. The San Diego Regional Board's Basin Plan is designed to preserve and enhance water quality and protect the beneficial uses of all regional waters. Specifically, the Basin Plan: (1) designates beneficial uses for surface and ground waters; (2) sets narrative and numerical objectives that must be attained or maintained to protect the designated beneficial uses and conform to the state's antidegradation policy; (3) describes implementation programs to protect the beneficial uses of all waters in the region; and (4) describes surveillance and monitoring activities to evaluate the effectiveness of the Basin Plan.

Copies of the Basin Plan may be obtained by contacting the Regional Board at 858-467-2952, or may be obtained online at: <http://www.swrcb.ca.gov/rwqcb9/programs/basinplan.html>.

What are the three possible 401 actions?

After review of the application, all relevant data, and any recommendations of a Regional Board, other state and federal agencies, and any interested person, the state board, the executive director, when acting as the state board's designee, or executive officer shall (1) issue certification with or (2) without technical conditions or (3) deny certification for any discharge resulting from a pertinent activity before the federal period for certification expires. Conditions shall be added to any certification, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements. If certification is denied, the applicant shall be notified in writing of the denial and the reasons for the denial.

An application for water quality certification may be denied when:

- the activity requiring a federal license or permit will result in a discharge which will not comply with applicable water quality standards and other appropriate requirements; or
- compliance with water quality standards and other appropriate requirements is not yet necessarily determined, but the application suffers from some procedural inadequacy (e.g., failure to provide a complete fee or to meet CEQA requirements). In this case denial shall be without prejudice.

What are the typical delays or problems you encounter when reviewing 401 applications?

Long delays in completing a 401 certification action typically occur when an application is submitted before a certified California Environmental Quality Act (CEQA) document is available; failure to provide sufficient information on proposed mitigation; and failure to provide information on post-construction BMPs. The type of project can also result in an increase in processing time. For example, a project that proposes to fill all surface waterbodies within the project footprint will take longer to process than a project that proposes conservation. Similarly, more environmentally friendly development practices, such as bridges or arch culverts in lieu of small metal culverts, preservation of natural stream bed and bank in lieu of hardscape, typically result in less processing time.

The ACOE said I don't need a permit, do I need 401 certification?

If your project is not subject to a federal permit then you do not need 401 certification. Please be aware that projects that are eligible for coverage under post-construction notification nationwide permits, section 9 and 10 of the Rivers and Harbors Act, and Regional General Permits all need 401 certification prior to impacting the waterbody. There is also no minimum discharge size to trigger the need for 401 certification.

If your project qualifies for coverage under one of the nationwide permits the State Water Resources Control Board has already issued 401 certification to, you still must comply with the notification requirements prior to impacting the waterbody. Notification requirements and information on certified nationwide permits can be found at:

<http://www.swrcb.ca.gov/rwqcb9/programs/401cert/NWP%20certification.pdf>.

If your project does not need a federal permit because the waterbody has been determined to be isolated, then you need to apply for and obtain Waste Discharge Requirements from the Regional Board prior to impacting the waterbody.

If you are uncertain if you need a permit, contact the Regional Board.

What should go into the mitigation plan?

At a minimum, the mitigation plan should include:

1. A site map showing the location of the mitigation area in relationship to the impact area.
2. A map showing existing resources within and adjacent to the mitigation area.
3. A figure showing the proposed plant layout and plant palette.
4. A discussion of beneficial uses (as described in the Basin Plan) that will be lost or impacted through project implementation, and how the proposed mitigation will compensate for these losses/impacts.
5. A discussion of maintenance and monitoring activities and duration.
6. A conceptual mitigation plan prepared to the ACOE guidelines may be submitted in lieu of the above items for an application to be considered complete. However, for a certification action to be taken, all of the information in items 1-5 must be provided to the Regional Board.

The ACOE has published guidance on developing mitigation plans. This document can be found at: <http://www.spl.usace.army.mil/> under the Regulatory link. Mitigation plans should provide as much of the information identified in the ACOE guidance as possible.

Can you recommend any useful references that will help in designing my project to avoid impacts to waters of the U.S. and State?

There are numerous references on impacts to waters of the U.S., hydrology, stream functions, mitigation, water quality, and other issues relevant to 401 certification. A few references are listed here to provide a starting point; an exhaustive listing of documents is beyond the scope of this FAQ.

Mount, Jeffrey F. 1995. *California Rivers and Streams*. University of California Press.

Riley, Ann L. 1998. *Restoring Streams in Cities. A Guide for Planners, Policymakers, and Citizens*. Island Press.

U.S. Department of Agriculture. *Stream Corridor Restoration. Principles, Processes, and Practices*. <http://www.usda.gov>